Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

On Appeal from the Supreme Court of the State of California

APPELLANTS' REPLY BRIEF

JAMES R. PARRINELLO*
JOHN E. MUELLER
CHRISTIANE T. RIESS
NIELSEN, HODGSON, PARRINELLO & MUELLER
650 California Street
Suite 2650
San Francisco, CA 94108
Telephone: (415) 989-6800

PETER J. DONNICI
University of San Francisco School of Law
2130 Fulton Street
San Francisco, CA 94117
Telephone: (415) 666-6220

Attorneys for Appellants

**Counsel of Record*

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. THE BERKELEY RENT STABILIZATION ORDINANCE CONFLICTS WITH AND IS PREEMPTED BY § 1 OF THE SHERMAN ACT WHICH MANDATES PRICE COMPETITION AMONG PRIVATE COMPETITORS	4
A. The Sherman Act's Prohibition Against Price Tampering Applies To The Fixing Of Maximum As Well As Minimum Price	4
B. Non-Immune Municipal Price Stabilization Programs Are Preempted By The Sherman Act	6
1. The Berkeley Ordinance Stands As An Obstacle To The Accomplishment Of The Full Objectives Of The Sherman Act	7
2. The Ordinance Places Irresistible Pressure On Private Property Owners To Stabilize Their Rental Prices	8
C. Appellees' Plea For A "Public Welfare" Defense Has Been Rejected By Congress	13
III. THE BERKELEY ORDINANCE IS NOT AUTHORIZED BY A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE LAW. IT THEREFORE IS NOT EXEMPT NOR IMMUNE FROM THE COVERAGE OF FEDERAL ANTITRUST LAWS	15
IV. CONCLUSION	20

TABLE OF AUTHORITIES

CASES — PAGE(S)

Albrecht v. *Herald Co.*, 390 U.S. 145 (1968) 4, 5, 10
Arizona v. *Maricopa County Med. Soc'y.*, 457 U.S. 332 (1982) 4, 5, 13
Birkenfeld v. *City of Berkeley*, 17 Cal.3d 129, 550 P.2d 100, 130 Cal.Rptr. 465 (1976) 16
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 7, 9, 10, 11
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) 20
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 2, 6, 7, 8, 14, 17, 20
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982) 6, 7, 8, 14, 19
Fashion Originators Guild v. *FTC*, 312 U.S. 457 (1941) 10
Golden State Transit Corp. v. *City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984), cert. denied, ____U.S.____, 105 S.Ct. 1865 (1985), after remand, 754 F.2d 830 (9th Cir. 1985), cert. granted, ____U.S.____, 105 S.Ct. 3475 (1985) 11, 16
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 7
Keifer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) 4
McClain v. *Real Estate Board*, 444 U.S. 232 (1980) .....
Nash v. *Florida Industrial Comm.*, 389 U.S. 235 (1980) 15
(1967) 7
Northern Pacific Ry. Co. v. *United States*, 356 U.S. 1 (1958) 10
Parker v. *Brown*, 317 U.S. 341 (1983) 9
Perez v. *Campbell*, 402 U.S. 637 (1971) 7
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 7
Rice v. *Norman Williams Co.*, 458 U.S. 654 (1982) 8, 9
Russell v. *United States*, ____U.S.____, 105 S.Ct. 2455 (1985) .. 15
Santa Monica Pines, Ltd. v. *Rent Control Board*, 35 Cal.3d 858, 679 P.2d 27, 201 Cal.Rptr. 593 (1984) 19
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (151) 11
Springs Ambulance Service, Inc. v. *City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984) 16
Town of Hallie v. *City of Eau Claire*, ____U.S.____, 105 S.Ct. 1713 (1985) 15, 17
United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) 10
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 4

CONSTITUTIONS — PAGE(S)

United States Constitution, art. VI 7
California Constitution, art. XI, § 3 16

STATUTES AND BILLS

15 U.S.C.
§ 1 ..... *passim*
§ 2 9
§ 35 ..... 3, 14
Cal. Govt. Code
§ 65580 ..... 17, 18, 19
§ 65589 17
Cal. Health & Safety Code
§ 50001 ..... 7, 15, 18, 19
§ 50200 19
§ 50202 ..... 7, 18
H.R. Rep. No. 5992, § 3, 98th Cong., 2d Sess. (1984) 3
H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 13 (1984) 3, 14
Cal. Assembly Bill 3788 (Campbell 1976) 17
Staff Analysis, California State Local Government Comm., Assembly Constitutional Amendment 81 (Miller) (Amended May 1, 1974) 16
Elmwood Commercial Rent Stabilization and Eviction Protection Ordinance, Berkeley, California, Ordinance 5468-N.S. (June 8, 1982) 6

AUTHORITIES

L. Tribe, American Constitutional Law, § 6-24 (1978) 8

NO. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

On Appeal from the Supreme Court of the State of California

APPELLANTS' REPLY BRIEF

I. INTRODUCTION

At issue in this case is whether the price-fixing activities of a municipal agency, acting without any affirmatively expressed state authorization, are preempted because of direct interference with the Sherman Act's mandate for price competition in the marketplace.

Any evaluation of this case must necessarily begin with the recognition that we are dealing with a purely local ordinance; appellees seek to downplay this fact by their continued and repeated citation to and reliance on cases which involve challenges to state, not municipal law. This is a crucial distinction

and one which appellees refuse to recognize in advocating a blanket municipal "public welfare" exemption from the antitrust laws. Without saying so directly, appellees argue that there is no difference whatsoever under the Sherman Act between the decision of a local government to fix prices and a similar decision by a sovereign state. This untenable argument has been rejected not only by this Court, but also by recent Congressional action, and cannot be seriously considered.

The central question presented by this appeal is whether this nation's economy is to be controlled by Congress or by the thousands of local governmental units across the nation. Appellees argue that local governmental units may, at will, override the Sherman Act's mandate of free price competition in order to serve local parochial interests. Despite the fact that this Court has repeatedly stated that price competition is the "central nervous system of the economy," nowhere do appellees even mention the serious and far-reaching economic implications of unauthorized local price-fixing laws; nor do they set any limits or parameters on the power they would give cities to abrogate price competition. Thus, under appellees' theory, economic choices counseled solely by the parochial interests of local governments could be made without regard to their economic and anticompetitive effects. This Court has condemned just that result. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (hereinafter "*Lafayette*").

Berkeley attempts to bolster this entirely unreasonable argument by invoking populist rubric to support the proposition that its price-fixing ordinance should be insulated from judicial scrutiny because it is a "pro-consumer" law passed by popular vote. This argument proves too much: it takes little imagination to understand that any initiative that transfers wealth from a minority to a majority of the population will command strong electoral support. However, this does not confer any additional protection to appellees' Rent Stabilization and Eviction for Good Cause Ordinance (hereinafter, the "Ordinance"). Moreover, such price controls and fixing of maximum prices are not "pro-consumer" measures, as evidenced in the universal condemnation of rent control by virtually all economists who have studied its long-term effects (see Appellants' brief, at 26-28).

Nor is there any guarantee that future local pricing-fixing will be "pro-consumer." Moreover, Congress has already determined that the free market is ultimately in the best interest of the consumers of this nation, and that decision is supreme over appellees' asserted claims.

Indeed, appellee's argument in favor of blanket municipal price-regulation cannot be squared with Congressional action in passing the Local Government Antitrust Act of 1984, 15 U.S.C. § 35 ("LGAA"). Responding to concerns voiced by members of this Court, Congress exempted cities from monetary damages in antitrust actions. However, Congress simultaneously reaffirmed its supremacy over municipal control of the economy, by rejecting bills which would have immunized local actions undertaken to promote "the public health, safety and welfare." H.R. Rep. No. 5992, § 3, 98th Cong., 2d Sess. (1984). Congress elected not to exclude local governments from the application of the antitrust laws (H.R. Report No. 98-965, 98th Cong., 2d Sess. 13 (1984)), which is precisely what appellees ask this Court to do.

The Berkeley price-fixing law is purely a local creation and not the product of a clearly articulated and affirmatively expressed state policy. Nor is it narrowly drawn to promote low and moderate income housing pursuant to the local interest proferred by appellees, as it controls the rent of all Berkeley rental housing including luxury units. In the final analysis, the Ordinance is an unauthorized and purely local attempt to fix the price of 23,000 rental units and directly control price competition in an industry which is vital to the flow of interstate commerce and the functioning of the nation's economy, by placing irresistible pressure—the threat of criminal prosecution—upon appellants to deter them from engaging in price competition.

II. THE BERKELEY RENT STABILIZATION ORDINANCE CONFLICTS WITH AND IS PREEMPTED BY § 1 OF THE SHERMAN ACT WHICH MANDATES PRICE COMPETITION AMONG PRIVATE COMPETITORS.

A. The Sherman Act's Prohibition Against Price Tampering Applies To The Fixing Of Maximum As Well As Minimum Price.

This Court has consistently ruled that Section 1 of the Sherman Act (15 U.S.C. § 1) mandates price competition in the private sector. Prices are to be established by competitive market forces, and any program which has the purpose or effect of ". . . raising, depressing, fixing, pegging or stabilizing . . ." prices is illegal per se and in direct and facial conflict with Section 1. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, (1940); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982).

Appellees do not deny that the Ordinance interferes with, and indeed, criminalizes price competition among private owners of the 23,000 rental units in Berkeley. Instead, they attempt to justify the Ordinance as one which set maximum prices (Appellees' brief, at 3), leaving property owners free to lower rents, which, they argue, is more consistent with the pro-consumer policies of the Sherman Act.[1]

This same simplistic argument has been consistently rejected by the Court. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Albrecht v. Herald Co.*, 390 U.S. 145, 152-153 (1968); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 342-348 (1982).

Maricopa is especially relevant here. In that case, the Court recognized that in price-stabilization schemes, the established maximum price becomes the fixed price. 457 U.S. at 347. Further, the evil of any price stabilization program is that it substitutes the subjective, parochial and perhaps erroneous

[1] Appellees contend that landowners are "free to compete" by "lowering rents, improving services and making improvements to their units" (Appellees' brief, at 3). This argument underscores the fallacy of appellees' reasoning: how does one pay for such "improvements" while simultaneously "lowering rents"?

judgment of the entity setting the price ceiling (in our case, the City of Berkeley) for the forces of the competitive market in determining the reasonableness of prices:

> Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay.

Maricopa, 457 U.S. at 347, quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 152-153 (1968)).

In *Maricopa*, Justice Stevens reaffirmed for the Court that a price stabilization program cannot escape per se condemnation because it limits maximum price, recognizing that the per se rule is grounded on our national and federal legislative commitment to price competition as a market force, and not on a policy of low selling prices at the expense of eliminating competition. 457 U.S. at 348. The same considerations which have prompted this Court's uniform condemnation of maximum price setting are applicable to the Berkeley law here at issue. Price competition among private lessors, and the setting of prices by free market forces in Berkeley—the primary federal legislative mandates under the Sherman Act—are directly prohibited. Berkeley substitutes "its perhaps erroneous judgment . . . for the forces of the competitive market." *Id.* at 347 (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 152-153 (1968)). Maximum rental rates bureaucratically set by the Berkeley Rent Board may be fixed too low to encourage new construction of rental units[2] or to enable current property owners to furnish services and convenience which the tenants desire and which enhance the value of the property for the tenants. Berkeley has rejected the federal mandate and the

[2] Appellees argue that the Ordinance does not discourage new construction because such units are exempt from rent controls (Appellees' brief, at 4). However, investors are understandably reluctant to rely on such exemptions since Berkeley has in the past arbitrarily abolished them, thereby removing their "protection" retroactively. For example, when the Ordinance was adopted in June 1980, it exempted property of four units or less where one unit was occupied by the owner. In 1982, this exemption was abolished, and "previously exempt" units were subjected to the onerous effects of the law. See Ordinance, § 5f (J.S. App. at A-114); § 10c (J.S. App. at 123).

enduring economic value of price competition in favor of pursuing a parochial and temporary interest for lower prices.

B. Non-Immune Municipal Price Stabilization Programs Are Preempted By The Sherman Act.

Appellees next argue that the universally accepted rule that price stabilization schemes are prohibited by the Sherman Act must not be applied to cities. According to this argument, cities must be afforded some vague type of "public welfare defense" so they can pursue ". . . experimentation in things social and economic." (Appellees' brief, at 24-25, 27.) Appellees warn that invalidation of the Ordinance "would cast a pall of suspicion over a host of mundane municipal measures other than rent control." (Appellees' brief, at 28.)

These expressions of fear are completely out of place. It would, indeed, be a radical departure from fundamental constitutional principles applicable to the Supremacy Clause to disregard the federal legislative mandate that prices be established by competition and market forces and adopt appellees' view that local governments are free to establish their own pricing systems any time they are deemed to be in the local interest. Under appellees' theory not only can the City of Berkeley fix the price of rents; it could also prohibit price competition and set prices for an unlimited variety of other products or services including commercial rents,[3] newspapers, food, clothing, pharmaceutical and medical supplies, hospital rates, even automobiles and television sets. Thus a city, without any state authorization whatsoever, could declare its independence from the Sherman Act's mandate of price competition, all in pursuit of local parochial interests or "experimentation." *Cf. Lafayette,* 435 U.S. at 408; *Community Communications Co. v. City of Boulder,* 455 U.S. 40, 50-51 (1982).

[3] Indeed, recently Berkeley has enacted measures to control commercial rental rates. Elmwood Commercial Rent Stabilization and Eviction Protection Ordinance, Berkeley, California Ordinance, 5468-N.S. (June 8, 1982).

Under our system of federalism, the freedom of state and local governments to experiment in finding legislative solutions to current problems ends when their regulations run contrary to supervening federal legislation.[4] Current federal legislation preserves the power to "experiment" with regulatory displacement of competition to state governments, while *denying* such policymaking discretion to cities acting *sua sponte.* Under any analytical approach to the doctrine of preemption, the Berkeley ordinance is in direct and facial conflict with the price competition mandate of Section 1 of the Sherman Act and must be invalidated under the Supremacy Clause. U.S. Const., art. VI.

1. The Berkeley Ordinance Stands As An Obstacle To The Accomplishment Of The Full Objectives Of The Sherman Act.

Under the traditional approach to Supremacy Clause and/or preemption issues, this Court has never hesitated to invalidate state or local regulations which stand as an obstacle to the accomplishment and execution of the full purposes and objectives of federal legislation. Local policies must give way to supervening federal legislative judgments. *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978). Numerous state and local laws, even though not in direct or irresistible conflict with federal statutes, have been invalidated because they undermined objectives which Congress sought to achieve through its legislation. *See, e.g., Perez v. Campbell,* 402 U.S. 637 (1971); *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977); *Nash v. Florida Industrial Comm.,* 389 U.S. 235 (1967).

Local deviations from federal antitrust policy are no exception. *Lafayette, supra; Boulder, supra,; California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980). Municipalities may not enact regulations which conflict with federal antitrust laws unless such are pursuant to a "clearly articulated and affirmatively expressed" policy of the

[4] As will be shown more fully in Argument II below, this is especially true with respect to the housing market in California, where the State Legislature has declared that a "healthy housing market" depends on the interplay of "free marketplace" forces. Health & Safety Code, §§ 50001, 50202, *et seq.*

state legislature. *Lafayette*, 435 U.S. at 410-413; *Boulder*, 455 U.S. at 51-55. As will be shown in II, below, the Berkeley rent control ordinance is not authorized by state law; it must be viewed, therefore, as nothing more than a non-immune local ordinance which facially conflicts with supervening federal legislation.

There can be little doubt that the Sherman Act mandates price competition as a national economic policy and that the ordinance at issue here prohibits price competition, thereby standing as an obstacle to federal policy. Appellees urge the Court to ignore or reject this clear line of authority and instead rule, as did the California Supreme Court, that cities be granted a judicially created "public welfare defense" with respect to local regulations which conflict with federal antitrust laws. In other words, that cities be ". . . free to place their own parochial interest above the Nation's economic goals as reflected in the antitrust laws. . . ." *Lafayette* at 412-413· *Boulder* at 51. Allowing public interest claims to oust the national mandate for competition would be a radical departure from traditional preemption analysis and prior rulings of this Court.

2. The Ordinance Places Irresistible Pressure On Private Property Owners To Stabilize Their Rental Prices.

In an attempt to answer the preemption challenge, appellees argue that Section 1 of the Sherman Act preempts the Ordinance only if the latter ". . . mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases. . . ."[5] (Appellees' brief, at 12 n.32, citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).) Appellees then devote a major portion of their brief to arguing that no "conspiracy" has been shown so there can be no violation of

[5] Counsel for appellees has, in the constitutional law treatise he authored, rejected the approach he here advocates. He has recognized that a local law is preempted if it discourages conduct that federal legislation seeks to encourage (Here, for example, price competition). L. Tribe, *American Constitutional Law*, § 6-24, at 378 (1978).

Section 1.[6] However, appellees are guilty of misreading, misapplying and only selectively quoting from *Rice*, which, in the same sentence as that quoted by them, goes on to recognize that even a state law is preempted if it ". . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute," 458 U.S. at 661.

The Ordinance here examined places "irresistible pressure" on private property owners to stabilize, depress and peg their rental rates and thereby effectuates a per se violation of the Sherman Act. In his opinion for the Court in *Rice*, Justice Rehnquist, citing *Midcal*, specifically recognized that a governmental program which mandated price-fixing facially conflicted with the Sherman Act. 458 U.S. at 659. The Court noted: ". . . It is not surprising, therefore, that a statute which requires practices per se illegal under the Sherman Act may be subject to facial challenge under the Supremacy Clause." 458 U.S. 659-660 n.5. Thus, contrary to the ruling of the California Supreme Court and the argument advanced by appellees, (Appellees' brief, at 33-35), application of per se principles to governmental price stabilization programs is not a new or unprecedented concept.

The ruling in *Midcal* is particularly instructive in resolving the present preemption issue and disposing of appellees' preoccupation with "conspiracy." The Court found that the state's "plan" or "system" for wine pricing (445 U.S. at 102, 103) was preempted by the Sherman Act, without regard to the presence of any private conspiracy or combination. It was not the private party but the state that compelled wholesalers to charge certain prices. The Court focused on the reality of the market effect that resulted, not the presence of an agreement. The sole issue then remaining was whether the State of California's involvement in the price-fixing program was sufficient to invoke the immunity established in *Parker v. Brown*, 317 U.S. 341 (1943). It was not.

[6] Appellants have also contended that the Berkeley ordinance violates Section 2 of the Sherman Act. The California Supreme Court erroneously rejected this argument. (J.S. App. at A-34.)

In *Midcal*, Justice Powell, speaking for the Court, recognized that the evil of the wine pricing system was that it vertically dictated resale price maintenance which resulted in the destruction of horizontal price competition. 445 U.S. at 103. Appellees seek to distinguish *Midcal* because, there, the statute commanded private wholesalers to participate in the initial setting of the resale price. This distinction might be of some relevance in a private antitrust action against the wholesalers, but it is wholly irrelevant to the preemption issue.[7]

It must be recognized that this case was not filed as a federal antitrust action claiming damages for a "violation" of the Sherman Act; rather it is an action challenging the facial constitutionality of the Ordinance.[8] The issue is not whether Berkeley or its officials have engaged in a combination or

[7] Appellees' preoccupation with "conspiracy" and the specter of business tycoons gathered in a smoke-filled room to fix prices is entirely misplaced in a preemption case such as this. In any event, as established in appellants' brief at 22-23, the Ordinance does satisfy the "combination" provision of Section 1. By its terms, the Ordinance vertically mandates that property owners stabilize their rental prices. This forms a combination between appellees, on the one hand, and the property owners on the other. It also creates a horizontal combination among the landlords. That the property owners are unwilling parties who participate in the combination under compulsion does not negate the existence, strength or impact of the combination as a restraint of trade. *See Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). This concept of compelled participation is not unfamiliar in the context of vertical price stabilization programs or other per se violations of Section 1. *Fashion Originators Guild v. Ftc*, 312 U.S. 457 (1941) (concerted refusal to deal), and *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958) (tying arrangements).

[8] Contrary to appellees' suggestion (brief at 5), appellants' complaint sought a declaratory judgment that the Ordinance was facially unconstitutional (Complaint, J.A. at A-6-8). The complaint alleged that the ordinance substantially reduced the value of rental units, prevented landowners from charging rents sufficient to meet their mortgage obligations and inhibited the sale and refinancing of their properties. Complaint, ¶¶ 16-22 The Ordinance facially affects the purchase, sale and refinancing of property; it discourages capital improvements thereby affecting financing and the interstate flow of goods and materials. Ordinance §§ 10-13; J.S. App. G at A-122-131; see also J.S. App. at A-140-151. Indeed, the California Supreme Court (at appellees' express request, J.S. App. at A-5) did hear and decide the issue of whether the Sherman Act preempts the Berkeley Ordinance—so the issue is properly before the Court. (See appellants' brief at 7-8 and cases there cited.)

conspiracy[9] to restrain trade, but whether the Ordinance compels private property owners to fix, stabilize and depress prices at which they rent their property to private tenants contrary to the Sherman Act's mandate that prices in the private sector be established by competitive market forces. The Ordinance itself imposes upon the market-place a price-fixing, or rent stabilization program which prohibits private property owners in Berkeley from engaging in price competition in the rental of their units. The strangulation of price competition is the same whether accomplished by a private conspiracy or by this municipal ordinance.

Of course, not all local regulations which have some anticompetitive effects conflict with federal antitrust laws. The Court clearly spelled out, in *Rice*, the distinction which is applicable here. If the local regulation mandates private conduct which is not illegal per se, the local law does not facially conflict with the Sherman Act and thus is not facially preempted. Where the local regulation mandates private conduct, however, which has traditionally been found to be a per se violation of Section 1, particularly price-fixing[10], then the local law does facially and irresistibly conflict with the Sherman Act. 458 U.S. at 659; *Midcal*. As this Court stated in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951): "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." In *Midcal* and *Schwegmann*, this Court found that the Sherman Act preempted *state* price regulations. The present

[9] Thus appellees' disputable arguments that the city's action is not conduct of a market participant and does not involve competitive favoritism or corruption (brief at 20-24) are wholly irrelevant here.

[10] Thus, under appelleees' hypothetical examples, municipal regulations fixing the prices of private taxis, or parking garages (Appellees' brief, at 17) would be invalid under the Supremacy Clause, absent approval by the State. In California, the state legislature has authorized taxi fare regulation by a clearly articulated and affirmatively expressed policy which partically substitutes a regulatory regime for open price competition. *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1865 (1985); *after remand*, 754 F.2d 830 (9th Cir. 1985), *cert. granted*, ____ U.S. ____, 105 S.Ct. 3475 (1985). This *state* legislation meets the requirements for antitrust immunity under *Parker v. Brown*.

case involves only unauthorized municipal action and is, therefore, an even stronger case for favoring federal antitrust policy over local parochial interests.

This analysis also answers the arguments raised and alarm sounded by appellees that a ruling invalidating the Berkeley ordinance will prevent local governments from enacting a wide range of municipal programs. For example, appellees feign fear that an adverse ruling would jeopardize the power of local governments to enact municipal zoning ordinances (Appellees' brief, at 17-18), building codes, rules regulating street vendors, door-to-door solicitation after dark (Appellees' brief, at 27), sanitation standards for restaurants, barring children from convenience stores and poolhalls, regulating reasonable closing hours for dancehalls and restricting the locations of bars and adults theatres and bookstores. (Appellees' brief, at 28 n.66.)

The simple answer to appellees' fears is that none of the above-described local regulations even remotely compels private parties to engage in conduct which, absent the regulation, per se violates Section 1. Thus, none of those and similar police regulations would be facially in conflict with or preempted by the Sherman Act.

Appellants here do not seek a ruling which paralyzes local government from protecting the health, safety and welfare of its citizens. However, in pursuing its police power, a municipality cannot compel private conduct which interferes with federal legislative mandates. By requiring private property owners to stabilize and depress rental prices, Berkeley seeks to prohibit price competition, thus paralyzing the "central nervous system" of the economy and directly obstructing federal economic legislative objectives which require that prices in the private sector be establish through the forces of the free market.

C. Appellees' Plea For A "Public Welfare" Defense Has Been Rejected By Congress.

Appellees, their amici, and the court below refused to recognize that Congress has specifically rejected the very same proposition they are now urging this Court to embrace. Congress refused to enact a "public welfare," "health, safety and welfare" or "police power" exemption or defense to the antitrust laws. Under the circumstances, it would be anomalous for the Court now to do so.

If Berkeley is to be allowed to compel private property owners to stabilize, depress and fix their rental rates, such a decision is not for the Court, but for Congress. In similar situations where defendants urged approval of certain allegedly justified, or socially and economically desirable price stabilization programs, this Court has firmly ruled that Congress has outlawed all price-fixing schemes and, therefore, only Congress can establish exceptions to its legislative mandate:

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed *genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such shift is to be made, it must be done by Congress. Certainly Congress has not left us with any such choice.*

Maricopa, 457 U.S. at 346 (quoting *Socony-Vacuum*, 310 U.S. at 221-222 (1940)) (emphasis added).

As more fully set forth in Appellants' Opening Brief, (pp. 15-16)[11] municipalities specifically requested that Congress enact legislation to give them the same antitrust exemption or immunity as currently enjoyed by the states. Other proposals

[11] See also Brief Amicus Curiae of the California Apartment Association In Support of Appellants' Jurisdictional Statement (at 11-14); Brief Amicus Curiae of the Coalition for Competition in Apartment Rentals In Support of Appellants (at 21-23).

sought Congressional action which would provide local governments with a "health, safety or welfare" defense nearly identical to that advocated herein by appellees. Congress, in enacting the Local Government Antitrust Act of 1984 ("LGAA"), 15 U.S.C. § 35, rejected these proposals.[12] The House Judiciary Committee's reasoning is most instructive in this regard (H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 13 (1984) at p. 8):

> If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.

Appellees seek to downplay Congress' expression of intent by emphasizing the distinction between "exemption" and "violation" and arguing that the LGAA involved only the former. (Appellees' brief, at 26.) This, appellants submit, is plainly wrong. As *Lafayette* made clear, the word "exemption" is merely "a shorthand expression" for whether the Sherman Act was "intended by Congress to prohibit the anticompetitive restraint" imposed by municipal action. 435 U.S. at 393 n.8. Congress, aware of this Court's prior decisions such as *Boulder* and *Midcal*, plainly chose not to exclude local governments from the full application of the antitrust laws (House Report No. 98-965), which is almost precisely what appellees ask this Court to do. To apply a "social welfare" defense to a municipal price stabilization program, as did the Court below, is to grant cities an exemption from federal antitrust laws. This would allow cities to elevate their "parochial interests" to a preferred position over federal antitrust objectives contrary to the rulings of this Court and the long-standing mandate of Congress, recently reaffirmed, that only *states* are permitted the discretion

[12] This Congressional action lays to rest appellees' undue emphasis on the Court's "different complexion" footnotes in *Lafayette*, 435 U.S. at 417, n.48; *Boulder*, 455 U.S. at 56, n.20. Moreover, subsequent to both cases, this Court in *Rice*, supra, reaffirmed the rule in *Midcal*, supra, that even non-immune state imposed price restraints are facially preempted by the Sherman Act. *A fortiori*, mere municipal price stabilization programs must be invalidated.

to displace the competitive regime with regulatory policy.[13] This is particularly true in the housing industry which is vital to interstate commerce (*see Russell v. United States*, ____ U.S. ____, 105 S.Ct. 2455 (1985); *McLain v. Real Estate Board*, 444 U.S. 232 (1980)).

III. THE BERKELEY ORDINANCE IS NOT AUTHORIZED BY A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE LAW. IT THEREFORE IS NOT EXEMPT NOR IMMUNE FROM THE COVERAGE OF FEDERAL ANTITRUST LAWS.

In *Parker v. Brown, supra*, this Court recognized that federal antitrust legislation was not intended by Congress to apply to *state* programs. Simply stated, the state can make the sovereign determination that, in certain well-defined situations, free market policies should be displaced by a regulatory regime. Similarly, the state can, through clearly articulated and affirmatively expressed legislation, authorize local government units to enact regulations which would otherwise conflict with federal antitrust laws. *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 105 S.Ct. 1713 (1985). However, cities acting alone, without specific state authorization, have no such power. *Boulder, supra.*

[13] As stated in Appellants' Opening Brief (at 37-41), the California Supreme Court's ruling elevates local price regulation programs to a higher priority than the Sherman Act's prohibition against price stabilization unless plaintiffs can establish the existence of alternative means for effectively achieving the City's purposes in a manner which would have a less instrustive impact on federal antitrust policies. The net effect of this test is to give preference to local regulations over federal legislative mandate.

Indeed, if any such "social welfare" defense is to be developed, the burden of proving that no reasonable alternative exists should be upon the City which seeks to avoid supervening federal legislative mandate.

In our present case, it would be difficult to envision any more intrusive impact on federal antitrust policy than price-fixing. The California Legislature has, itself, adopted "free marketplace" principles with respect to housing. Health & Safety Code, § 50001. The dissent of Justice Lucas from the ruling below sets forth various alternatives through which Berkeley could achieve its housing objectives by means more consistent with the strong federal mandate favoring price competition. (J.S. App. at A-86.)

Thus, if the California Legislature deemed rent control to be important to the welfare of its citizens, it could enact a rent control statute or specifically authorize its cities and counties to adopt such measures. The state has, in other contexts, found it necessary in furthering the public interest to restrict price competition in certain segments of the private sector. *Golden State Transit Corp. v. City of Los Angeles, supra,* (taxicab fares); *Springs Ambulance Service, Inc. v. City of Rancho Mirage,* 745 F.2d 1270 (9th Cir. 1984). The California legislature has not, however, enacted rent stabilization statutes nor has it authorized cities to adopt rent control ordinances, and therefore the Berkeley ordinance is entitled to no immunity from federal antitrust laws.

Appellees' argument that the legislature authorized this Berkeley rent control ordinance strains credibility. First, they cite a ministerial "ratification" by the legislature in 1972 (eight years prior to the enactment of the Ordinance here challenged). (Appellees' brief, at 36.) This novel argument has surfaced for the first time in appellees' brief on the merits here. That legislative "ratification" was pursuant to a practice whereby *every* charter amendment adopted by any California charter city was required to be approved by the legislature. These ratifications were automatically and *without exception* passed by the legislature[14] and can hardly be deemed a state policy decision or authorization to displace federal antitrust mandates with local regulation. In any event, the 1972 Berkeley rent control charter amendment there involved was subsequently held unconstitutional by the California Supreme Court. *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 550 P.2d 100, 130 Cal.Rptr. 465 (1976). By the time the current Berkeley Ordinance was adopted, the "legislative ratification" procedure for charter amendments had been abolished and the Legislature did not subsequently approve any form of rent control. It is thus clear that the current Ordinance has never been approved by the legislature. In view of appellees having raised this dubious

[14] This practice was required by Article XI, § 3 of the California Constitution until 1974 when it was repealed because it was a meaningless act that was a bother to the Legislature. While it was in effect "there [were] no instances where a charter or amendment has been rejected by the Legislature." Staff Analysis, California Senate Local Government Comm., Assembly Constitutional Amendment 81 (Miller) (amended May 1, 1974).

argument, appellants are constrained to point to a far more relevant and more recent indication of the intent of the California Legislature regarding rent control, which can be found in a 1976 statute *prohibiting* rent control. California Assembly Bill 3788 (Campbell, 1976). This statute was vetoed by then-Governor Edmund G. Brown, Jr., but nevertheless indicates the latest legislative view of rent control in California.

Next, appellees argue that municipal imposition of rent control was "contemplated" by the state legislature in certain provisions in the Government Code (§§ 65580, *et seq.*). These statutes merely require each city to develop a general land use plan which includes a "housing element." The legislature has expressly stated that these Government Code sections shall not be construed to be a grant or repeal of authority which may exist for a local government to impose rent control. Government Code § 65589. Thus, these statutes do not, themselves, authorize local rent control; nor do they meet the test consistently applied by this Court for finding that municipal ordinances are authorized by state action: In *Town of Hallie,* 105 S.Ct. at 1716, the Court reaffirmed its earlier statement in *Lafayette,* 435 U.S. at 413, that ". . .to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'"

In *Town of Hallie,* there were numerous Wisconsin statutes which specifically authorized cities to fully regulate sewerage systems, including determining the area to be served. The legislature clearly authorized a regulatory scheme as to sewerage systems to be administered by cities. Once it was recognized that the state legislature authorized a regulatory regime, the Court proceeded to find that the specific anticompetitive conduct alleged in the antitrust suit was contemplated by the legislature.

Town of Hallie in no way supports appellees' arguments for state action immunity here. The state of California has never made the requisite threshhold decision to displace competition with a regulatory regime in housing. Indeed to the

contrary, the California legislature, in 1977, enacted Health & Safety Code § 50001 which expressly adopts as state policy regarding housing. The statute expressly adopts as state policy the promotion of "free marketplace" principles in the California housing market:

> § 50001. Importance of Housing
>
> The Legislature finds and declares that the subject of housing is of vital statewide importance to the health, safety, and welfare of the residents of this state, for the following reasons:
>
> . . .
>
> (c) *A helathy housing market is one in which residents of this state have a choice of housing opportunities and one in which the housing consumer may effectively choose within the free marketplace.*
>
> (d) A *healthy housing market* is necessary both *to achieve a healthy state economy* and to avoid an unacceptable level of unemployment. (Emphasis added.)

In Health & Safety Code § 50202, the legislature further provides "nothing in this division shall authorize the imposition of rent regulations or controls . . ." (with certain exceptions not here applicable). Appellees completely ignore these recent California statutes and, instead, make a vague and wholly unsupportable argument that, in other statutes, the legislature "contemplated" rent control. (Appellees' brief, at 38-39). The Health & Safety Code sections cited above (and related provisions) preclude any argument that the state has chosen to displace free market principles with regulation in the rental housing market.

Even the Government Code Sections cited by appellees fail to support their argument that rent control was contemplated, much less authorized, by the legislature. Appellees' selective and partial quotation of Government Code 65580 (Appellees' brief, at 38) conceals the fact that the policy embodied in that statute is that municipalities should promote the improvement and development of housing, not fix the price of rents. "Local

and state governments have a responsibility to use the powers vested in them *to facilitate the improvement and development of housing* to make adequate provision for the housing needs of all economic segments of the community." (Emphasis added; italicized portion omitted from appellees' quotation of the text of the statute.) A reading of the complete wording of the statute demonstrates that it in no way contemplates, or authorizes, rent control.

Thus, the mandate of the relevant Government Code provisions is to compel cities to develop land use and housing plans which will, in the future, promote the development of new housing construction and improvement of existing housing. This should be accomplished in a "free marketplace" environment. Health & Safety Code § 50001 (which is a provision "deemed controlling" with respect to all state housing law and policy. Health & Safety Code § 50200).

In the final analysis, the authority of Berkeley to enact its rental price stabilization Ordinance is not derived from any state statute which clearly articulates and affirmatively expresses a state sovereign decision to displace price competition with regulation. As appellees, themselves, are forced to concede, Berkeley's power to impose rent control is based on municipal police power. (Appellees' brief, at 39 n.89.) The Court below similarly found that "California has no State rent control statute." *Fisher*, 37 Cal.3d at 655, J.S. App. at A-6. See also: *Santa Monica Pines, Ltd. v. Rent Control Board*, 35 Cal.3d 868, 297 P.2d 27, 201 Cal.Rptr. 593 (1984), reaffirming the non-statutory police power roots of municipal rent control in California. This is precisely the situation which this Court examined in *Boulder* and found insufficient to confer immunity from federal antitrust laws.

To paraphrase Justice Brennan's words in *Boulder*, 455 U.S. at 55-56: The relationship of the State of California and Berkeley's rent control Ordinance "is one of precise neutrality." We are faced here with a broad and all-pervasive rent control

ordinance with no state legislative authorization[15] to support it. Clearly, the State of California has not made a sovereign policy decision to displace antitrust policy, price competition and free market principles with a regulatory regime.

IV. CONCLUSION

This cases poses a most clear example of conflict between federal and local law. The Sherman Act's mandate of price competition is clearly contravened by a non-immune municipal ordinance which prohibits price competition under threat of criminal prosecution. For all of the foregoing reasons, the decision below should be reversed and the Berkeley rent control Ordinance declared facially unconstitutional under the Supremacy Clause.

Dated: November 1, 1985

Respectfully submitted,

JAMES R. PARRINELLO*
JOHN E. MUELLER
CHRISTIANE T. RIESS
NIELSEN, HODSON,
PARRINELLO & MUELLER
PETER J. DONNICI

**Counsel of Record*

[15] Moreover, there is a complete absence of any state guidelines or active state supervision to prevent Berkeley from pursuing flagrant and extreme anticompetitive conduct unnecessary to the accomplishment of state housing goals. In *Midcal*, a state wine pricing regulation of private parties was held preempted because of lack of active state supervision; *a fortiori* this city price regulation of the private rental market must be invalidated, not only for lack of active state supervision, but also because the city ordinance operates totally independent of any state guidelines which are necessary to assure that the immunity is no broader than necessary to meet the sovereign's regulatory interest. *Lafayette*, 435 U.S. at 417-418 (Justice Marshall, concurring opinion). As Chief Justice Burger observed, *Lafayette*, 435 U.S. at 425-426 (concurring opinion): "This supplemental inquiry would consist of determining whether the implied exemption from federal law 'was necessary in order to make the regulatory Act work, and even then only to the minimum extent necessary.'" (citing *Cantor v. Detroit Edison Co.*, 428 U.S. 579 at 597 (1976)).